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Attorney for Plaintiff, Don Congrove dba
Congrove Construction

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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

'08 CV 1191 H LSP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

**DON CONGROVE dba CONGROVE
CONSTRUCTION,**

Plaintiff,

vs.

WESTERN MESQUITE MINES, INC.,

Defendant.

CASE NO.

COMPLAINT FOR:

- 1. BREACH OF WRITTEN CONTRACT**
- 2. COMMON COUNT FOR SERVICES RENDERED**
- 3. UNJUST ENRICHMENT**
- 4. FORECLOSURE OF MECHANIC'S LIEN**

DEMAND FOR JURY TRIAL

Plaintiff, Don Congrove dba Congrove Construction ("Plaintiff"), alleges:

JURISDICTION

1. This action is brought and jurisdiction is proper in this Court under and pursuant to the provisions of 28 U.S.C. § 1332.
2. Plaintiff is an individual and a citizen of the State of Arizona.
3. Defendant, Western Mesquite Mines, Inc. ("Defendant"), is a corporation formed under the laws of the State of Nevada, with its principal place of business in the State of California, and a citizen of the States of Nevada and California.
4. The amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

1 VENUE

2 5. Venue is proper in the Southern District of California pursuant to 28 U.S.C.
3 § 1391(b), in that the acts or omissions on which the claim is based, or a substantial part thereof,
4 occurred in such District, and, further, in that the property which is the subject of the claim is
5 located in such District.

6
7 PARTIES

8 6. At all times relevant hereto, Plaintiff owned and did business as "Congrove
9 Construction," and had valid Class B (General Building Contractor) and Class C-8 (Concrete)
10 licenses issued by the California Contractors State License Board to him under such business
11 name.

12 7. Plaintiff is informed and believes, and upon that basis alleges, that Defendant is,
13 and at all times relevant hereto was, the owner or reputed owner of certain improved real
14 property located at 6502 East Highway 78, Brawley, Imperial County, CA 92227, Assessor's
15 Parcel No. 739-330-002 (the "Property"), on which Defendant operates an open pit mine known
16 as Western Mesquite Mine.

17
18 GENERAL ALLEGATIONS

19 8. On or about August 8, 2007, Plaintiff (under the name "Congrove Construction")
20 entered into an agreement (the "Agreement") with Defendant pertaining to a construction project
21 on the Property. The general terms of the Agreement were memorialized in a document titled
22 "Management Representative Agreement Between Western Mesquite Mine and Congrove
23 Construction," which was executed on behalf of Plaintiff and Defendant. Under the Agreement,
24 Congrove Construction was to provide management services to Defendant for a period of up to
25 six months in connection with a construction project on the Property and was to act as
26 Defendant's management representative to monitor the subcontractors for compliance with the
27 Defendant's instructions, plans, and specification; Defendant was to furnish Congrove
28 Construction with, among other things, all engineering designs, all plans, and five complete sets

1 of drawings for each for the improvements; and Defendant was to be compensated for its
2 services by payment to it of the following sums: \$230,000, of which \$46,000 was for
3 mobilization costs; plus 3% of the project budget (which was initially scheduled for \$4,000,000,
4 but was subsequently increased to \$4,630,000 - which the parties agreed at the time of the
5 increase was a more accurate figure and would be the amount from which savings would be
6 based); plus 50% of any cost savings for the project achieved for the project.

7 9. On or about August 19, 2007, Congrove Construction commenced its services at
8 the Property.

9 10. Plaintiff has performed all conditions and covenants required of Congrove
10 Construction under the terms of the Agreement, except for those conditions and/or covenants,
11 if any, which were precluded or otherwise excused due to Defendant's material breach of
12 contract and/or due to other lawful excuse.

13 11. Plaintiff is informed and believes, and upon that basis alleges, that Congrove
14 Construction achieved cost savings for the construction project in the amount of approximately
15 \$701,536.56.

16 12. On October 26, 2007, Defendant unilaterally terminated the services of Congrove
17 Construction for the construction project without proper cause.

18 13. Defendant paid Plaintiff a total of \$91,000, for the mobilization cost and services
19 of Congrove Construction.

20 14. Defendant has failed to pay any additional monies owing under the Agreement,
21 despite demand therefor.

22
23 **FIRST CLAIM FOR RELIEF**

24 **[Breach of Contract]**

25 15. Plaintiff incorporates, by reference, Paragraphs 1 through 14, of this Complaint
26 as though fully set forth herein.

27 16. Defendant has materially breached the Agreement by failing to provide complete
28 plans in a timely manner, by wrongfully terminating Congrove Construction's services on the

1 construction project, and by failing to pay monies owing to Congrove Construction under the
2 Agreement.

3 17. As a direct and foreseeable result of Defendant's material breach of the
4 Agreement, Plaintiff has been damaged in the principal amount estimated to be \$576,086.72,
5 plus prejudgment interest thereon.

6
7 **SECOND CLAIM FOR RELIEF**

8 **[Unjust Enrichment]**

9 18. Plaintiff incorporates, by reference, Paragraphs 1 through 17, of this Complaint
10 as though fully set forth herein.

11 19. Plaintiff is informed and believes, and upon that basis alleges, that by reason of
12 the foregoing, Defendant has been unjustly enriched in the principal amount estimated to be
13 \$576,086.72, plus prejudgment interest thereon.

14
15 **THIRD CLAIM FOR RELIEF**

16 **[Common Count for Services Rendered]**

17 20. Plaintiff incorporates, by reference, Paragraphs 1 through 7, of this Complaint as
18 though fully set forth herein.

19 21. Plaintiff is informed and believes, and upon that basis alleges, that there is due and
20 owing by Defendant to Plaintiff, the principal sum of \$576,086.72, plus pre-judgment interest
21 thereon, for services rendered by Plaintiff to Defendant at the request of Defendant.

22 22. No part of the above amount has been paid, despite demand therefor, and Plaintiff
23 is informed and believes, and upon that basis alleges, that there remains due and owing by
24 Defendant to Plaintiff, the principal sum of \$576,086.72, plus pre-judgment interest thereon.

25
26 **FOURTH CLAIM FOR RELIEF**

27 **[Foreclosure of Mechanic's Lien]**

28 23. Plaintiff incorporates, by reference, Paragraphs 1 through 14, inclusive, of this

1 Complaint as though fully set forth herein.

2 24. Plaintiff is informed and believes, and upon that basis alleges, that the reasonable
3 value of the services which Congrove Construction provided to Plaintiff is \$523,505.16, after
4 deducting all just credits and offsets and excluding lost profit.

5 25. The services provided by Congrove Construction were actually used in the work
6 of improvement.

7 26. Plaintiff is informed and believes, and upon that basis alleges, that the whole of
8 the Property is required for the convenient use and occupation of the work of improvement.

9 27. On June 11, 2008, a Mechanic's Lien for the sum of \$523,505.16, was filed in a
10 timely manner with the Imperial County Recorder on behalf of Plaintiff and recorded as
11 Document No. 2008-016344, which Mechanic's Lien was properly verified by the Declaration
12 of Plaintiff, by Holly Congrove (Plaintiff's attorney-in-fact pursuant to a Power of Attorney).

13 28. Plaintiff incurred costs for recording the Mechanic's Lien.
14

15 WHEREFORE, Plaintiff prays for Judgment in his favor and against Defendant as
16 follows:

17 **ON THE FIRST CLAIM FOR RELIEF**

- 18 1. Compensatory damages in a principal amount according to proof, but in excess of
19 the minimum jurisdiction of this Court and estimated to be \$576,086.72; and
20 2. Prejudgment interest thereon.
21

22 **ON THE SECOND CLAIM FOR RELIEF**

- 23 1. For the principal sum of \$576,086.72; and
24 2. Prejudgment interest thereon.
25

26 **ON THE THIRD CLAIM FOR RELIEF**

- 27 1. For the principal sum of \$576,086.72; and
28 2. Prejudgment interest thereon.

ON THE FOURTH CLAIM FOR RELIEF

1
2 1. That the Mechanic's Lien be foreclosed, and that judgment be made for the sale
3 of the Property; that the proceeds of the sale be applied in payment of the principal amount
4 owing to Plaintiff on the Mechanic's Lien, plus interest thereon at the legal rate; and that
5 Defendant be barred and foreclosed from all rights, claims, interests, or equity of redemption in
6 the Property and every part of the Property when the time for redemption has passed; and

7 2. That Plaintiff at his election be permitted to credit bid the amount owing to him
8 and become a purchaser at the foreclosure sale; and

9 3. If there is a deficiency of proceeds to satisfy the amount owing to Plaintiff, that
10 judgment for the deficiency be entered against Defendant.

11
12 **ON ALL CLAIMS FOR RELIEF**

13 1. For Plaintiff's reasonable costs of suit incurred herein.

14 2. For such other and/or further relief as is just and proper.

15
16
17 Dated: July 2, 2008


ROBERT PETROKOFSKY
Attorney for Plaintiff, Don Congrove
dba Congrove Construction

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: July 2, 2008



ROBERT PETROKOFSKY
Attorney for Plaintiff, Don Congrove
dba Congrove Construction

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

CONGROVE, DON dba CONGROVE CONSTRUCTION

(b) County of Residence of First Listed Plaintiff Yuma

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Robert Petrokofsky, Attorney at Law, 895 Dove Street, Third Floor
Newport Beach, CA 92660; (714) 384-6542

DEFENDANTS

WESTERN MESQUITE MINES, INC.

County of Residence of First Listed Defendant Imperial

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

Orlando B. Foote of Horton, Knox, Carter & Foote, LLP, 509
South Eighth Street, El Centro, CA 92243; (760) 344-2360

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. section 1332

Brief description of cause:

Breach of Written Contract; Common Count; Unjust Enrichment; Foreclosure of Mechanic's Lien

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

07/02/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

152619

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

JAC 7/3/08

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

152619 - TC

**July 03, 2008
11:08:06**

Civ Fil Non-Pris

USAO #: 08CV1191

Judge.: MARILYN L HUFF

Amount.: \$350.00 CK

Check#: BC3741

Total-> \$350.00

**FROM: CONGROVE, DON DBA CONGROVE
CONSTRUCTION VS.
WESTERN MESQUITE MINES**